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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO DE JESUS NINO CORONA,

Defendant and Appellant.

F057390

(Super. Ct. No. MCR032279)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Kari L. Ricci, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Cornell, A.P.J., Hill, J., and Kane, J.

Pursuant to a plea agreement, appellant Antonio De Jesus Corona pled guilty to inflicting on a spouse corporal injury resulting in a traumatic condition (Pen. Code, § 273.5, subd. (a)).¹ The court imposed a prison sentence of four years, and made various orders, including two that we footnote, and which we refer to, respectively, as the 10-year restraining order and the general restraining order.² The court also awarded appellant presentence custody credit of 420 days, consisting of 280 days of actual time credit and 140 days of conduct credit.

On appeal, appellant contends the 10-year restraining order and the general restraining order exceeded the court's jurisdiction and must be stricken. In addition, we deem to be raised the contention that appellant is entitled to additional conduct credit under a recent amendment to section 4019. We will strike the 10-year restraining order and the general restraining order, remand for further proceedings, and in all other respects affirm.

DISCUSSION

Restraining Orders

Appellant argues that the court exceeded its jurisdiction in making the 10-year restraining order. Specifically, he argues that the order was not authorized by section 273.5, subdivision (i) (section 273.5(i)) or on any other basis. The People do not argue otherwise. We agree.

Section 273.5(i) provides: "Upon conviction under subdivision (a) [of section 273.5], the sentencing court shall also consider issuing an order restraining the defendant

¹ All statutory references are to the Penal Code.

² The court told appellant: "[(1)] You are excluded for ten years, pursuant to Penal Code section 273.5, subdivision (i), from being around the victim or the victim's residence. [¶] [(2)] You are not to commit any further acts of violence[,] threats, stalking, sexual abuse, or harassment against the victim." We refer to the first of these orders as the 10-year restraining order and the second as the general restraining order.

from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation.”

Thus, section 273.5(i) authorizes the court to issue an order restraining the defendant from “contact with the victim.” The trial court, however, purporting to act under the authority of section 273.5(i), issued an order restraining appellant from “being around the victim or the victim’s residence” for a period of 10 years. Because appellant could “be[] around” the victim’s residence, if not the victim herself, and yet not “contact” her, the 10-year restraining order goes beyond, and is therefore not authorized under, section 273.5(i). Respondent does not suggest any other basis on which that order is authorized, nor are we aware of any. Accordingly, the 10-year restraining order cannot stand.

Appellant also argues, as best we can determine, that the general restraining order must be stricken because it prohibits conduct--acts of violence, threats, stalking, sexual abuse, harassment--that “are already forbidden by the Penal Code.” He seems to suggest that this order is part of the 10-year restraining order and that it simply specifies certain kinds of “contact” to be included in that order. Respondent apparently agrees.

However, as indicated above, the two orders are separate and distinct. First, the court imposed the 10-year restraining order, referring specifically to 273.5(i) as authority for the order and limiting it to 10 years’ duration. Next, the court imposed the general restraining order, without citing any authority, statutory or otherwise, and without placing any time limitation on the order.

Thus, the general restraining order, although it prohibits various kinds of contact with the victim, does not limit the order's duration. However, as indicated above, an order prohibiting contact with the victim made pursuant to section 273.5(i) may be of no more than 10 years' duration. Therefore, the general restraining order is not authorized by section 273.5(i).³ Moreover, as respondent appears to agree, this order is not authorized on any other basis. Like the 10-year restraining order, it must be stricken.

We turn now to the question of the proper disposition. Respondent argues that the matter should be remanded to allow the trial court to issue an restraining order "consistent with section 273.5(i)." Appellant contends both orders must simply be reversed, and that no remand is necessary. In our view, remand is the proper disposition.

Section 273.5(i) mandates that where, as here, a defendant is convicted of violating subdivision (a) of section 273.5, the court "*shall consider*" a restraining order. (Italics added.) And the court's reference to section 273.5 demonstrates the court intended to issue an order pursuant to that statute. On this record, we conclude the proper disposition is a remand to allow the court to consider imposing a restraining order under section 273.5(i). (§ 1260 [appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"].)

Conduct Credit

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a)). In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and

³ We assume without deciding that the general restraining order otherwise complies with section 273.5(i).

regulations (§ 4019, subd. (c)). These forms of section 4019 presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

The court sentenced appellant in April 2009, and calculated appellant's conduct credit in accord with the version section 4019 then in effect, which provided that conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to the benefit of the more generous conduct credit accrual provisions of the 2010 amendment to section 4019, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment is contrary to the intent of the Legislature and violates equal protection principles. We deem these contentions raised here.

As we explained in the recent case of *People v. Rodriguez* (March 1, 2010, F057533) __ Cal.App.4th __ [pp. 5-12]), the 2010 amendment does not operate retroactively and does not violate the constitutional guarantee of equal protection of the laws. Appellant is, therefore, not entitled to additional conduct credit under that amendment.

DISPOSITION

The 10-year restraining order and the general restraining order are stricken. The matter is remanded to the trial court. On remand, the trial court is directed to consider issuing a restraining order under section 273.5(i). In all other respects, the judgment is affirmed.